

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

PHOENIX PICCADILLY, LTD.)	
)	
V.)	CASE NO. 8790
)	
PICCADILLY BUILDERS, INC.)	

O R D E R

On March 18, 1983, Phoenix Piccadilly, LTD. ("Phoenix"), a limited partnership owning and operating the Piccadilly Square Apartments, filed with the Commission a complaint against Piccadilly Builders, Inc., ("Piccadilly") which owns and operates the sewage treatment facility serving the Piccadilly Square Apartments. Phoenix alleged that the rates being charged by Piccadilly for sewage treatment service were unfair, unjust and unreasonable and in contravention of KRS 278.030 because the capacity of Piccadilly's treatment plant was grossly in excess of the capacity required to serve Piccadilly's customers. Phoenix further contended that the rates were excessive because Piccadilly's salaries for the year ended December 31, 1981, were \$33,000 in excess of a reasonable level of salaries for a sewage treatment utility the size of Piccadilly.

On April 22, 1983, Piccadilly filed its answer to the complaint wherein it denied Phoenix's allegations that its

rates were unfair, unjust and unreasonable. Phoenix responded to Piccadilly's answer on May 13, 1983, therein stating that said answer did not satisfy its complaint and reiterating the allegations contained in its original complaint. Phoenix further stated that its information and data requests had been delivered to Piccadilly and requested that Piccadilly respond to said requests in a timely manner. Copies of Phoenix's information and data requests and Piccadilly's responses to those requests were filed with the Commission on June 28, 1983, and the matter was set for hearing on July 19, 1983.

On July 11, 1983, Piccadilly filed a motion for a continuance of at least 2 weeks, citing settlement negotiations with Phoenix which had delayed its preparation for the hearing. On July 15, 1983, the Commission granted a continuance and set the matter for hearing on August 10, 1983,

On July 28, 1983, Piccadilly filed a motion to dismiss the complaint on the grounds that it was not a utility as defined by statute, and therefore, not subject to the Commission's jurisdiction. Piccadilly further contended that the statute defining "utility" was special legislation rather than general law and was therefore unconstitutional. On August 5, 1983, Phoenix filed its response opposing the motion to dismiss stating that Piccadilly was a utility under the jurisdiction of the Commission. In order to rule on the motion, the Commission cancelled the hearing scheduled for August 10, 1983, and deferred setting a new hearing date until a ruling could be made. On August 18, 1983, the Commission

denied the motion to dismiss, set the matter for hearing on September 18, 1983, and ordered that prepared testimony be filed by August 26, 1983.

On August 31, 1983, the Commission rescheduled the hearing to September 23, 1983, at which time the hearing was held at the Commission's offices in Frankfort, Kentucky. Both parties were represented by counsel and each presented expert witnesses. Post-hearing briefs and replies thereto were submitted by November 7, 1983, and the information requested at the hearing has been filed with the Commission.

COMMENTARY

Piccadilly is a privately-owned utility providing extended aeration sewage treatment service in Jefferson County, Kentucky. Piccadilly provides service to approximately 35 residential customers, 25 commercial customers and 689 units in the Piccadilly Square Apartments. Piccadilly owned and operated the Piccadilly Square Apartments prior to January, 1981, at which time it sold the apartments to its adversary in this proceeding, Phoenix.

The sewage treatment facilities owned and operated by Piccadilly have been in operation since 1971, and the rates charged by Piccadilly for sewage treatment service have been in effect since prior to this Commission's jurisdiction being extended to sewage treatment utilities in 1975. Piccadilly's sewage treatment facility includes four tanks with a combined capacity of 450,000 gallons per day ("GPD") all of which were constructed prior to 1975.

SCOPE OF COMPLAINT

In its original filing, with Piccadilly's operating results for calendar year 1981 as the basis for its complaint, Phoenix complained of Piccadilly's alleged excessive capacity and excessive salaries. In subsequent filings, particularly the prefiled testimony of Mr. M. Dell Coleman, utility rate consultant, Phoenix attempted to expand its complaint to include proposed adjustments related to Piccadilly's contributed property, accounts receivable and purchased water cost. These additions to the original complaint were based on a review of Piccadilly's operating results for calendar year 1982 and its responses to Phoenix's information and data requests.

The Commission is of the opinion and finds that the scope of this examination should be limited to Piccadilly's operating results for the calendar year 1982. As Mr. Coleman indicated, the data are more current and should better reflect present operating conditions. The Commission also finds that much of the data supplied by Piccadilly in response to Phoenix's requests for information are relevant to this proceeding. However, this proceeding is not a rate case and has not been treated as such by the Commission. This case has been treated as a complaint proceeding in which the Commission's role is to decide whether (a) Phoenix has presented sufficient evidence to support its claims that Piccadilly's rates to it are unfair, unjust and unreasonable,

or (b) Piccadilly has presented sufficient evidence to support its denial of the allegations made by Phoenix.

The Commission has evaluated the information contained in the record and the presentations of revenue requirements advanced by Phoenix and Piccadilly. As this is a complaint proceeding, the Commission has not conducted an in-depth investigation of Piccadilly's revenue requirements as would be done in a general rate case but has, instead, relied on the evidence as presented by the parties. Of the issues presented, the Commission is primarily concerned with the alleged excessive capacity of Piccadilly's treatment facilities. This does not mean that the Commission is unconcerned about the other issues raised by Phoenix and Piccadilly, but it is of the opinion that those matters could be better addressed in a rate case rather than a complaint proceeding. However, based on the case presented by the parties to this proceeding the Commission does not find sufficient evidence to initiate a show cause proceeding against Piccadilly at this time. Therefore, the scope of the Commission's review and decision in this matter has been limited to the issue of the capacity of Piccadilly's treatment facilities as it relates to Piccadilly's operations for calendar year 1982.

RESOLUTION OF MOTIONS

At the hearing of September 23, 1983, Piccadilly renewed its motion to dismiss the complaint on the grounds that it was not a utility subject to the Commission's

jurisdiction. The Commission is of the opinion that the renewed motion presents no substantive arguments that were not included in the original motion on which the Commission ruled in its Order of August 18, 1983. Absent any additional evidence on which to base an opinion, the Commission hereby affirms its Order of August 18, 1983, wherein it denied Piccadilly's motion to dismiss.

At the hearing of September 23, 1983, Phoenix entered a motion to strike the testimony of Piccadilly's witness, Mr. Charles E. Weiter of the Louisville and Jefferson County Department of Health ("Health Department"), on the grounds that Mr. Weiter was presenting direct testimony rather than rebuttal to Mr. Coleman's direct testimony. This motion was repeated in Phoenix's post-hearing brief. The Commission is of the opinion that, within the guidelines established by the hearing examiner, to which counsel for Piccadilly objected, the testimony of Mr. Weiter was rebuttal rather than direct testimony and should not be stricken from the record. Inasmuch as Mr. Weiter's oral testimony dealt specifically with Piccadilly's treatment capacity, which was the primary issue addressed by Mr. Coleman, the Commission is unable to accept Phoenix's argument. Furthermore, Phoenix has used its cross-examination of Mr. Weiter to argue its position in its post-hearing brief. Therefore, Phoenix's motion to strike the testimony of Mr. Weiter is hereby denied.

FINDINGS IN THIS MATTER

1. In 1973 the sewage treatment facility now owned by Piccadilly Builders had a total treatment capacity of 200,000 GPD which the Health Department required to be expanded to accommodate the development in the service area. The Health Department also required that several additional improvements be made to improve the plant's effluent treatment efficiency.

2. The 200,000 GPD plant in service in 1973 provided secondary aeration treatment which complied with the then-existing requirements of the Health Department.

3. In September, 1973, the Health Department increased its requirements for effluent quality to require tertiary treatment for all facilities approved after the fall of 1973. These requirements would also result in conversion of existing facilities to tertiary treatment at the time any increase was made to the nominal treatment capacity.

4. In 1973 the partnership of Ronald Hettinger and Paul Evola, which owned the treatment facility, anticipated that future development in the service area would eventually require capacity of approximately 450,000 GPD.

5. Owners Hettinger and Evola, to provide for the anticipated capacity needs and to circumvent the impending requirements for tertiary treatment, obtained approval for expansion of the plant to 450,000 GPD in July, 1973, with the addition of a 250,000-gallon aeration tank.

6. Since the addition of the 250,000-gallon tank the actual flow into the plant has not exceeded 250,000 GPD and the original 200,000-gallon aeration tank has not been utilized except when maintenance was required on the 250,000-gallon aeration tank.

7. In order to meet existing Health Department requirements for committed capacity and reserve capacity, the facility would have had to have been expanded to 300,000 GPD in 1981 had it not already been expanded in 1973 to 450,000 GPD.

8. Any addition of capacity after 1973 would have resulted in conversion of the entire facility to tertiary treatment at a capital cost of at least \$150,000. Additional annual operating costs would be required to maintain such converted facilities.

9. Phoenix contended that since the actual flow had not exceeded 250,000 GPD that an increment of 50,000 GPD in 1973 would have provided sufficient capacity to serve Piccadilly's customers. However, in making this argument Phoenix ignored the testimony of its witness, Mr. Coleman, that it is not reasonable to expect a utility to operate at the exact capacity required to serve its customers.

10. Phoenix presented no evidence to refute the testimony of Piccadilly's witnesses, Mr. Ellis King, Sales Engineer for Straeffer Sales & Service, Inc., and Mr. James Spaulding, of James L. Spaulding, Consulting Engineers, concerning the costs of implementing tertiary treatment and

the savings realized by Piccadilly by avoiding the conversion to tertiary treatment sometime after 1973.

11. Phoenix has failed to prove the allegations contained in its complaint that the plant has such excess capacity that Piccadilly's current rates are unfair, unjust and unreasonable. Furthermore, Phoenix presented no engineering studies or other evidence sufficient to overcome the evidence of Piccadilly that the plant expansion was necessary, at the very least as a cost savings measure.

12. The evidence presented by Phoenix primarily indicated that the plant's capacity exceeded the minimum capacity required to serve the existing customers. This assertion was made by Phoenix's witness who admitted no experience or education in engineering or plant design.

ORDERS IN THIS MATTER

On the basis of the matters set forth herein and the evidentiary record in this case, the Commission:

HEREBY ORDERS that by affirmation of the Order of August 18, 1983, the motion by Piccadilly to dismiss this proceeding be and it hereby is denied.

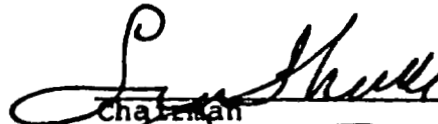
IT IS FURTHER ORDERED that the motion by Phoenix to strike the testimony of Mr. Charles Weiter from the record in this proceeding be and it hereby is denied.

IT IS FURTHER ORDERED that the rates proposed by Phoenix are unfair, unjust and unreasonable and are therefore denied.

IT IS FURTHER ORDERED that the rates currently charged
by Piccadilly shall remain in effect.

Done at Frankfort, Kentucky, this 17th day of January,
1984.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Secretary